No. 85-1129

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

PAUL E. JOHNSON,
Petitioner,
v.
TRANSPORTATION AGENCY,
SANTA CLARA COUNTY CALIFORNIA, and
SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 715,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF RESPONDENT SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 715

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QUESTIONS PRESENTED

May an employer, pursuant to a voluntary affirmative action plan which is agreed to by the union representing the employees involved, consider gender as a factor in the decision to promote a fully qualified woman where women have been historically excluded from the job classification and which plan is flexible with only minimal established goals?

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BRIEF OF RESPONDENT SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 715

The citations to the opinions below and the basis on which this Court's jurisdiction is invoked are set out at p. 1, Petitioner's brief.

STATUTORY PROVISIONS

The relevant statutory provision is 42 U.S.C. Section 2000e-2(a)(1), which reads:

> "It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge

any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."

STATEMENT OF THE CASE

A. The Proceedings Below

Petitioner Paul E. Johnson brought an action based exclusively on Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e *et seq.* (J.A. 5-8). The parties filed a Joint Pretrial Statement, referring only to Title VII. (J.A. 14-19). After a bench trial, the trial court entered Findings of Fact and Conclusions of Law (Pet. 3a-16a), which held that the Transportation Agency violated Title VII because the disputed Affirmative Action Plans were not temporary measures. (Pet. 14a) After the court's findings were issued, Respondent Service Employees International Union Local 715 was permitted to intervene as a defendant for the purpose of arguing the motion for new trial and any appeal. Local 715 is the recognized employee organization for most of Santa Clara County employees including those classifications involved in this case and it sought intervention because of its support for the Affirmative Action Plans which were incorporated into its Memorandum of Understanding with the County (J.A. 146). The trial court denied the motion for new trial.

On appeal, the Ninth Circuit reversed the district court and held, with one judge dissenting, that a fair reading of the Affirmative Action Plans placed them on the permissible side of the rules established in *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979), noting that since the Petitioner "did not challenge the affirmative action plan on equal protection grounds [the

court did] . . . not reach the issue." (748 F.2d at n.1).[1] After a petition for rehearing was denied, this Court granted certiorari on July 7, 1986.

B. A Statement of the Facts

1. Diane Joyce was hired in 1970 by the County of Santa Clara into its Office of Education as an Account Clerk, one of the predominately female job classifications within the broader "Office Clerical" category. Two years later, she laterally transferred to the Transportation Agency into the Road Department, maintaining the classification of Account Clerk. (T. 120). She was the first woman to occupy the Account Clerk classification in the Transportation Agency (T. 124). Prior to working for the County, she had extensive experience as a bookkeeper.

In 1974, Ms. Joyce applied for an opening in the Road Dispatcher position. She was deemed ineligible only because of her lack of "experience," which arose out of the circumstances that she had not served in the position of a Road Maintenance Worker. In 1975, Ms. Joyce transferred from the Senior Account Clerk position to a Road Maintenance Worker position, becoming the first woman to fill that position.

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[1] At the outset Petitioner's improper invocation of the Equal Protection clause (Br. 19-23), must be rejected. "[Where a] question . . . was neither argued nor decided in either of the courts below . . . this Court has been hesitant to review questions not addressed below." *University of California Regents v. Bakke*, 438 U.S. 265, 283 (1978). The Solicitor General suggests a more sophisticated analysis relying on the Equal Protection clause. (Br. at n. 5). He suggests that Title VII cannot be read to " 'authorize' unconstitutional behavior." *Id.* The question is not whether Title VII shields Respondent Transportation Agency's conduct, but whether Title VII prohibited the affirmative action undertaken in these circumstances. Finally, the record is insufficient to resolve the Constitutional issue. For, if we apply the strict scrutiny test, it would require a different level of fact finding which no party addressed to the trial court. For example, the Agency might have conceded discrimination against women under a strict scrutiny standard while denying it under a less stringent Title VII analysis.

Paul Johnson followed a similar employment history. Before working for the County, he was a supervisor and dispatcher for a private cement and aggregate concern. He hired on as a Road Yard Clerk in 1967, a clerical position which was downgraded in 1977 as part of a reorganization of the Transportation Department. There is an important significance to this: Contrary to the suggestion in Petitioner's Opening Brief (at 3) and the Solicitor General's Brief (at 29), Paul Johnson's demotion was caused by his voluntary decision, since the combination of his Road Yard Clerk position with that of Account Clerk resulted in a definite cut in salary (T. 127-28). Johnson did express the view that he hoped the demotion would open up promotional opportunities into higher Road Maintenance classifications. (T. 128). It follows, since his previous experience as a supervisor for a private company had qualified him for the Road Dispatcher position once before, his demotion was not intended to "earn" him any subsequent Road Dispatcher position or grant him any greater expectation for it.[2] At the time he transferred to the Maintenance Division as a Road Maintenance Worker, Ms. Joyce had occupied the position for the previous two years.

The Road Dispatcher position, which both Ms. Joyce and Mr. Johnson sought in 1974 and again in 1979, is essentially a clerical position in which the incumbent oc-

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[2] Johnson did nothing between 1974 and 1979 to "earn" the Road Dispatcher position. He was previously qualified by virtue of his experience before he came to the Transportation Agency. On the other hand, Diane Joyce had to obtain four years experience as a Road Maintenance worker in order to qualify for the 1979 opening. Ms. Joyce testified that after she was denied the 1974 promotional opportunity, "I went on the roads and got the experience they wanted." (T. 97 see also T. 107-108) The work itself is unattractive and demanding physically. (T. 108-109). If at all, it was Diane Joyce "who had invested [her] time and effort in a job and often has made great sacrifices with hope and expectation of advancing in [her] job." (Brief of Solicitor General, at 28.)

cupies an office and maintains records and coordinates workers and equipment to the respective job locations (T. 85). Road Maintenance Workers perform the actual physical labor on the roads. Account Clerks and Road Yard Clerks perform clerical functions within the Agency. In 1977, during the reorganization referred to above, the County determined that the Account Clerk position which Diane Joyce had occupied and the Road Yard Clerk position which Paul Johnson had occupied performed substanially equal work and were, therefore, merged into one classification, Account Clerk II (T. 107).

Prior to the promotional opportunity in dispute in this case, both Ms. Joyce and Mr. Johnson worked as Road Maintenance Workers (Mr. Johnson for two years and Ms. Joyce for four years). Both worked out of class performing Road Dispatcher duties for some time before the opening arose and both possessed prior relevant clerical experience: Ms. Joyce in working in the Account Clerk classification and Mr. Johnson working in the Road Yard Clerk classification.

When the Dispatcher position became available in 1979 as a result of the incumbent's retirement, Mr. Johnson and Ms. Joyce applied and were both deemed eligible based upon their experience and qualifications. The Transportation Agency administered an initial oral exam, conducted by two individuals who were not connected with the Transportation Agency. This oral board found seven of the applicants to be eligible and certified them for the position of Road Dispatcher. (J.A. 15). Mr. Johnson scored two more points than Ms. Joyce did in the oral interview, a difference which was deemed irrelevant because all those who scored above 70 were certified as eligible for the position.[3]

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[3] Only the first board "ranked" the applicants by score. The Second Circuit recently noted as to such test scores:

> "Recognizing the fact that small differences between the scores of candidates indicate very little about the candidates' relative

The second interview was conducted by three Transportation Agency supervisors who were familiar with both Ms. Joyce and Mr. Johnson. The panel unanimously recommended Paul Johnson, although for conflicting and contradictory reasons. We know the reasons why two of the members chose Mr. Johnson because they testified in the court trial: Clyde Davis and James Baldanzi.

Clyde Davis was a supervisor to whom Diane Joyce's vigorous union activities were "well known" (T. 167). In his view, "[t]he key factor was Mr. Johnson's previous experience as an Equipment Dispatcher" (T. 174). Mr. Davis felt that Mr. Johnson's "hands-on-experience" with the road equipment, experience which he obtained after 1977, was unimportant.[4] Mr. Davis had also observed Mr. Johnson performing Road Dispatcher work and believed he was doing it well or excellent (T. 177).

James Baldanzi was another Transportation Agency supervisor who held rather strong opinions about Diane Joyce before the interview. He viewed her union activities, which had on occasion involved the assertion of women's rights, as incompatible with the duties of Dispatcher (T. 160). He referred to Ms. Joyce as "a rebel-rousing, skirt-wearing-person" (T. 153). He held decidedly different expectations concerning the behavior of men and women while working for the Agency:

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merit and fitness, we have held that as a means of insuring compliance with Title VII 'the employer can acknowledge his inability to justify rank-ordering and resort to random selection from within either the entire group that achieves a properly determined passing score, or some segment of the passing group shown to be appropriate'." *Kirkland v. New York State Department of Correctional Services*, 711 F.2d 1117, 1133 (2nd Cir. 1983).

[4] Ms. Joyce had been denied the opportunity to apply to the prior promotional opportunity in 1974 because she lacked precisely this experience (T. 96-97).

Q "Did you also, in your deposition, make a comment that, "She's not a lady"?

A That's true. I made that statement.

Q Can you explain what you meant by that statement?

A Well, I've worked with Ms. Joyce in the past in the West Yard, and I have never heard a lady use the type of language that Ms. Joyce uses. And her actions at times, my personal feelings were that she did not act as a lady, as I know a lady to be.

Q Okay.

Let me ask you, when you say type of language, you're talking about rough language?

A I'm talking about, yes, I'm talking about a lot of very vulgar-type profanity.

Q Would you say that that is the language that's used on the roads with some frequency?

A It is amongst men, yes (T. 161:13-162:4).

Contrary to Clyde Davis, he gave the greatest weight to "hands on experience" with the equipment and very little weight with respect to Mr. Johnson's background in dispatching men (T. 150-151).[5]

The interview committee met and unanimously recommended Mr. Johnson. That recommendation was given to Ron Shields, who, in turn, recommended Johnson's appointment to James Graebner. It is here that the Affirmative Action Coordinator of the Transportation Agency interceded. Prior to the second oral interview, Ms. Joyce had contacted the County's Affirmative Action Office when she became suspicious that a supervisor had deliberately scheduled the second interview at the same time as she was required to attend a disaster preparedness class and, because of rumors she had heard, that Mr. Johnson was going to get the job, even before the second interview was held (T. 93-96). This kind of in-

[5] We do not know the views of the third interviewer because he did not testify, Ms. Joyce had had problems with the third person, Glenn Foreman. (T. 82, 91)

tercession or advocacy by an Affirmative Action Officer is one of the important functions of any affirmative action plan. The designated person acts on behalf of minorities or women to resolve problems and act generally as an ombudsman. The County Affirmative Action Coordinator, in turn, contacted Vic Morton, who is the Affirmative Action Coordinator for the Transportation Agency.

Mr. Shield's recommendation was transmitted to James Graebner, Director of the Transportation Agency. Likewise, Mr. Morton's recommendation that Ms. Joyce be promoted was given to Mr. Graebner, who was then faced with a difficult decision. The County's "Rule of 7" is a common personnel practice which is incorporated in the merit system rules in the County of Santa Clara. That rule provides that among the top seven individuals certified as qualified the appointing officer (in this case Mr. Graebner) is free to choose *any one* of seven (T. 19). As a matter of law, the appointing authority's decision to choose an individual from the seven certified as eligible is unreviewable.[6]

When faced with two qualified persons where "there was a difference of opinion between specifically the road operations people and the affirmative action director as to the desirability of certain individuals to be promoted . . ." (T. 171), Graebner chose the woman and, ultimately, it was her sex which was the deciding factor, as the trial court found, a finding which we believe the record supports.[7]

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[6] See p. 30, *infra*.

[7] It is not clear that the district court found Mr. Johnson to be more qualified, contrary to the suggestion of Petitioner. (Br. 8). Rather, the finding was that "[b]ased on the selection process . . . Plaintiff was the most qualified applicant for the position of Road Dispatcher." (Pet. 14a). The three person interview board did recommend Mr. Johnson as the most qualified, but as we have shown, that decision was infected with bias. Ultimately, as a matter

When Diane Joyce was made aware of her selection by Bert Di Basilio, who had been responsible for setting up the interview board and choosing its members, he remarked:

> "Well, you got it through affirmative action even though you were not qualified." (T. 100).

When Ms. Joyce challenged this hostile comment, he recanted and said Ms. Joyce was not "as qualified as Paul Johnson, Dick Jadrick." (T. 100). Jadrick was, of course, not even recommended for the job by departmental management.

When management in the personnel agency prepared the "personnel request and certification" (Trial Exhibit 12, J.A. 26-28), Paul Johnson and Diane Joyce were favorably compared:

> "Paul E. Johnson
>
> > Well-qualified applicant; two years of RMW experience plus 11 years of Road Yard Clerk. Has had previous outside Dispatch experience but was 13 years ago.
>
> * * * *
>
> Diane D. Joyce
>
> > Well qualified by virtue of 18 years of past clerical experience including 3½ years at West Yard plus almost 5 years as a RMW". (J.A. 27).

Mr. Graebner was at time of trial totally satisfied with Ms. Joyce's performance in the Road Dispatcher's position (T. 73).

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of law, it was up to the appointing authority, namely Mr. Graebner, to choose. And he viewed Mr. Johnson and Joyce as equally qualified. (T. 24, 57-58, 69 and 74-75). We submit that it would be an unwarranated intrusion into a personnel decision making process to impose a district court's judgment upon that of the head of the Agency who made the ultimate appointment.

2. The trial court found that the Transportation Agency has not discriminated "against women in regards to employment opportunities in general and promotions in particular." (Pet. 13a). The finding is not surprising in light of the fact that both Petitioner and Respondent Transportation Agency urged the court not to make a finding that any discrimination had occurred. We think the record is contrary both with respect to Diane Joyce as an individual as well as to women in general.

Myra Beals, who was a personnel officer within the Transportation Agency, recounted a specific incident in which a woman was denied training opportunities in the very Road Maintenance Division in which this dispute arose. (T. 230-31). She recounted a specific incident where Ms. Joyce complained because she was a subject of harassment, both verbal as well as physical, from a co-worker and management refused to take any remedial action. The responsible supervisor remarked to Ms. Beals: "Well, if it had been two men, they would have gone outside and fought it out and settled it." (T. 254).

Diane Joyce had been the victim of direct discrimination when she sought the transfer to the Transportation Agency as an Account Clerk:

> Q "Going back again to when you first became employed with the transit district, do you recall, when you were first interviewed for the position of Account Clerk, any comments made by any of the interviewers that suggested to you what they were looking for in that position?
>
> A When I first went over to 1505 Shallenburger to be interviewed by a man named Mr. John Catrin (Ph.), he greeted me, he said, "Good afternoon, Mrs. Joyce. Please be seated."
>
> And I was totally shocked, because the next sentence he said was, 'You know, we wanted a man."
>
> Q When was this comment made?
>
> A Probably in March of 1972.

> He then sent me to West Yard. Then Garcia was General Road Superintendent over there. He didn't even greet me. And as I sat down, he said, "Well, you know we're looking for a man."
>
> I got the job anyway" (T. 110:11-111:2).

In addition to this incident, Ms. Joyce testified that there were a number of specific incidents of discrimination directed against her. Several incidents arose out of her contact with Supervisor Baldanzi, who sat on the interview committee. The first incident involved a circumstance where she was unable to get coveralls for her job, where, "the men ahead of me got coveralls, the man behind me got issued coveralls but there were no coveralls for me. . ." (T. 89). Mr. Baldanzi ignored repeated requests until she finally filed a formal grievance, "and I had four pair of coveralls the next day" (T. 90). Another incident involved the situation where she was warned for lack of a traffic paddle (a hand-held sign for traffic to stop or start) when the men who were working around her were not even warned for similar safety infractions (T. 112-13). There were six other incidents which Ms. Joyce recollected but was not asked to describe in detail (T. 119).

The Transportation Agency itself has been the subject of charges of specific acts of discrimination and "across the board" complaints (T. 43-44). Indeed, since the promotion involved, there has been one judgment and a consent decree entered against the County arising out of similar questions of promotion and discrimination against women.[8]

We have also noted above the structural discrimination of the promotional system towards Road Dispatcher. It is a clerical position which is part of the promotional series from Road Maintenance Worker, a manual labor classification which has been exclusively occupied by men until Diane Joyce moved into the classification in 1975.

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[8] See brief of Respondent, Transportation Agency, n. 5.

Yet, historically, clerical positions have been predominately female. On the other hand, the Dispatcher position is the kind of promotional opportunity which has been reserved exclusively for men coming out of the ranks of Road Maintenance Worker. In contrast, Paul Johnson began work as a Road Yard Clerk, a position which was in 1977 reclassified into the Account Clerk II classification. The Road Yard Clerk was a male position and it was not until Diane Joyce's Senior Account Clerk position and Paul Johnson's Road Yard Clerk position were merged into the Account Clerk II classification that any woman occupied that position. In summary, women have been historically excluded from the dispatching-type position because of its arguable misclassification as a skilled-worker classification which had been historically filled by men where women had historically filled clerical positions.

These incidents of discriminatory conduct and structural discrimination were buttressed by the statistical data which was undisputed by any party. Of the 238 employees in skilled craft positions, including Road Dispatcher, none was a woman until Diane Joyce received this promotion. Likewise, Diane Joyce was the first woman to occupy a Road Maintenance Worker classification. In clerical positions in the Transportation Agency, 75.9 percent were women (T. 44). The County's "long range goal" was to equal the ratio of women "[i]n the area work force as indicated in the 1970 Census," (J.A. 54), which figure was 36.4 percent.[9] In contrast, the

[9] There is some force to the point made by the Solicitor General (Br. p. 24, n. 13) that applicant flow data (the number of women applying or seeking jobs) would be a more relevant indicator of the discrimination, if any, of the Transportation Agency. Likewise, evidence of futility, that women did not even apply because of discriminatory reputation would be relevant, *Local 28 of the Sheet Metal Workers International Association v. Equal Employment Opportunity Commission*, 478 U.S. ——, 92 L.Ed. 2d 344, 371 (1986). This Court cannot reach this debate since Petitioner did

statistics contained in the Affirmative Action Plan demonstrated far more women in other traditional male classifications as a result of an aggressive recruiting and hiring campaign (J.A. 49-50).

3. There are two Affirmative Action Plans. The County's Affirmative Action Plan was adopted October 16, 1979 (J.A. 11-131). The Affirmative Action Plan applicable to the Transportation Agency was adopted effective December 18, 1978 (J.A. 29-110). Neither plan had an ending date and neither plan contained any quotas whatsoever. Rather, each repeatedly used the word "attained" and its synonyms to describe the goals which were established with respect to the ethnic and sexual makeup of the work force. Nowhere is the word "maintained" or any synonym found in the 102 pages of text contained in the Joint Appendix. For example, the prefix states that "(t)he Transportation Agency goal is to attain an Agency work force whose compensation reflects the ethnic and sexual makeup of the area work force." (J.A. 34). Although the long range goal was "to attain a work force whose composition in all job levels and major job classifications approximates the distribution of women . . . in the Santa Clara County work force" (J.A. 54), short range employment goals were to be established (J.A. 61). The County recognized that it would be "extremely difficult to significantly increase the representation of women in technical and skilled craft job classifications where they have traditionally been underrepresented." (J.A. 58).

At the time of the promotional opportunity, no yearly goals had yet been established within the overall goals and, when those goals were established for the skilled

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"not challenge existence of the Affirmative Action Plan, this one in particular, or Affirmative Action Plans in general . . ." (T. 5). See also J.A. 17. No statistical evidence was offered by Petitioner to challenge either the evidence of gender composition of the Transportation Agency's work force nor the significance of those statistics.

craft classification, they were minimal and innocuous. The 1982 plan anticipated 55 openings and established a goal of placing only three women in those openings (J.A. 143). Assuming the plan remained at the same level, the number of women in skilled craft jobs would never exceed the same ratio of less than six percent of the classification. An argument could be made that such a minimal goal would perpetuate the unlawful underrepresentation since it would effectively set a maximum of six percent women in the skilled craft category. Thus, the lack of an ending date reflected the fact that it was unlikely that even this most minimal goal of placing women in skilled craft positions would ever come close to achieving anything near to parity with County-wide work force statistics of women in the work force.

The lack of ending dates is not surprising nor prejudicial since it was intended that goals would become irrelevant once they had been achieved and the plan, insofar as those classifications are concerned, would no longer be effective. Thus, the plans recognized those categories where parity or overrepresentation had been achieved (S.E.R. 209).

Fairly read, the plans recognized that there had been past County actions hindering the development of a representative County work force and emphasized that affirmative action "must be taken to remedy the effects of past practices in order to develop County work force whose make-up reflects the composition of the Santa Clara County community." (J.A. 112-113).

THE SUGGESTION OF A QUESTION OF MOOTNESS

We believe that the Court should be fully advised of those facts suggesting mootness of this dispute. *Fusari v. Steinberg*, 419 U.S. 379 (1975). Paul Johnson has now retired permanently from the County. The district court entered a judgment requiring that the County pay

$5,654.48, "representing all forms of compensation and benefits which plaintiff has not received as a result of his not being appointed to the position of Road Dispatcher in June, 1980. . ." (Pet. 1a). The judgment also required plaintiff be paid reasonable attorneys' fees. It is our understanding that the damages as well as the attorneys' fees have been paid by the County to Mr. Johnson and his attorney, respectively. We understand that Petitioner now claims some additional contributions must be made to the Public Employee Retirement System of the State of California. (Pet. Reply, 3). The judgment quoted above forecloses any request for further benefit payments.

In this light, the case may well be moot unless the County takes an affirmative position that it will demand reimbursement from Mr. Johnson of the monies paid to him or from his attorney for the fee award. We do not understand that the County has taken a specific position in that regard. Only if the County seeks reimbursement would mootness be avoided.[10]

ARGUMENT

I. INTRODUCTION AND SUMMARY.

In contrast to various *amici* and the Petitioner, who have discussed broad constitutional and statutory issues, we focus upon the compelling factual realities of this case in light of the principles of *Weber* and the subsequent cases which have considered the problems of remedying employment discrimination. We do so because the Transportation Agency's promotion of Diane Joyce proves the continuing validity of the *Weber* concepts and formulation that each affirmative action plan and its application must be judged in light of the particular

[10] The Transportation Agency's Brief notes this issue but does not state a position as to whether reimbursement will be sought. (Br. n. 7).

circumstances which generate it and under which it operates.

There are two themes which *Weber* generates and which are woven into the subsequent cases. First, the factual predicate for the affirmative action must be developed and that predicate need not be proven or agreed-upon discrimination. Second, the burden or disability, if any, upon those who are not in the protected group must be measured for its intrusiveness. As we shall show, there was a compelling factual predicate for the application of County's Affirmative Action Plans in this case and the plans themselves imposed no unnecessary burdens upon those who were not the subject of the plans' benefits.

The factual predicate for the Affirmative Action Plans, as applied in this case, falls into three related categories: (1) The manifest gender imbalance in the Transportation Agency's skilled work force, (2) The uncontradicted incidents of discrimination and harassment through which Diane Joyce and others in the County suffered, and (3) The structural barriers against women obtaining the promotion to the Road Dispatcher position, even though it was a clerical position similar to those which were elsewhere traditionally filled by women. When these facts are viewed together, had Paul Johnson been mechanically chosen for the promotion, Diane Joyce and Local 715 would have had various legal remedies against the Transportation Agency. The success of such action, whether by Title VII litigation or through the grievance procedure, would have been made easier because of the contradictory reasons given by members of the second interview panel as to why Paul Johnson was recommended over Diane Joyce. Applying the burdens of proof as established in *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981), Ms. Joyce and Local 715 would have easily presented a *prima facie* case, particularly in light of the characterization of

Ms. Joyce as a "rebel-rousing, skirt-wearing person" by one member of the interview committee. Whatever defense the County would have presented, it would have been pretextual in light of the contradictory reasons for the recommendation when compared to the County's own rating sheet which described them as indistinguishable (J.A. 27-28).

These circumstances prove the validity of the *Weber* formulation that employer or union need not prove discrimination in order to justify some affirmative action, particularly where it may be tested against job classifications which are traditionally segregated; and it is not challenged by any party that women have suffered from unlawful disabilities in such skilled craft positions.

The second theme addresses the burden, if any, imposed upon the complaining party. As we shall show, Diane Joyce's promotion imposed no disability upon Paul Johnson and the level of intrusiveness in this promotion setting is minimal. Under California law, Paul Johnson had no more than a hope of promotion; no more than the six others who were certified as eligible. He shared the same entitlement to the promotion, an entitlement which meant nothing more than that the Agency had the obligation to consider him. Under the "Rule of Seven," a rule which is commonly used under Merit System rules for public agencies, the appointing official has unreviewable discretion to promote whomever he or she wants without regard to comparative qualifications from those seven deemed eligible. No seniority right, nor right by virtue of qualifications, experience or score in the interview was given to Paul Johnson or Diane Joyce. Thus, the promotion of Diane Joyce intruded, at most, upon Paul Johnson's hope of promotion; he lost nothing and was only disappointed to the same extent as the five others who were deemed eligible and also lost out. Finally, where the Union which represents the employees involved has agreed to the affirmative action, it has rea-

sonably accommodated the competing interests of its members lending additional validity to the plans.

Having established these points, we address finally the arguments of Petitioner that the plans trammeled upon his rights and the plans were invalid because they were not temporary. Since Mr. Johnson had no entitlement to the promotion, we need only consider his contention with respect to the lack of a termination date on the plans. We think the court below fairly read the plans as being designed to be temporary remedial measures, particularly when viewed in light of this instance of promotion of the first woman into the skilled craft positions in the Transportation Agency. Since the *Weber* formulation explaining that such Affirmative Action Plans must be "temporary" arose out of the context of assuring that the plan was remedial, that test is easily met where the promotion was generated by an innocuous and conservative goal of filling less than six percent of the positions with women.

II. EVEN WITHOUT A FINDING OF DISCRIMINATION, THERE WAS A COMPELLING FACTUAL PREDICATE WHICH JUSTIFIES DIANE JOYCE'S PROMOTION UNDER THE AFFIRMATIVE ACTION PLANS.

Had James Graebner mechanically accepted the recommendation of the second interview committee to promote Paul Johnson, Local 715 and Diane Joyce would have had forceful legal remedies to challenge such a decision. Other than federal remedies under Title VII and the Equal Protection Clause,[11] a grievance under the Memo-

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[11] Where, as the Solicitor General correctly points out, the Agency's promotion of Mr. Johnson would have been subject to the "strict scrutiny" test (Br. p. 9), there is a certain compelling irony here. Had there been no Affirmative Action Plan, Diane Joyce would have had the benefit of the "strict scrutiny" test under the Equal Protection clause or Title VII in attacking the Johnson promotion. The position of Petitioner and the Solicitor General

randum of Understanding which incorporated the Affirmative Action Plan (J.A. 146) could have been initiated or the California statutory remedies could have been invoked.[12] The same predicate for the Affirmative Action Plans would have been the Union's or Diane Joyce's case. Contrary to the suggestion of Petitioner, it would not have rested solely upon statistical evidence (Pet. Br. 24-25), as we have shown in our Statement of the Facts. We are, however, prepared to show that the statistical evidence in the record was sufficient to validate the Affirmative Action Plans. In doing so, a quick comparison to *Weber* is instructive. In *Weber*, the employer recognized that as to its own skilled craft positions there was a manifest statistical imbalance; namely, only 5 out of 273 of the skilled craft workers had been black. In comparison to this case, none of the 238 skilled craft workers was a woman *and* Mr. Johnson sought promotion to a clerical type position within the skilled craft group where similar clerical dispatcher positions had been historically filled by women (See T. 7, 32-33; S. E. R. 202). That manifest statistical imbalance is sufficient to guarantee that any affirmative action is not unrelated to some past conduct by the employer which had the effect, direct or indirect, of discouraging or excluding women from those positions. Because Petitioner did not challenge the relevance or competence of those statistics nor attempt to rebut them with his own statistical evidence, they stand uncontradicted.

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imposes a higher burden upon the Respondent County to justify her promotion when the Affirmative Action Plan is invoked. Thus, any woman would be better off from a litigation posture in not asserting the application of Affirmative Action Plans but in asserting the "strict scrutiny" test. We think such a result is the kind of anomaly which this Court recognized in encouraging Affirmative Action Plans which are voluntarily adopted.

[12] California Government Code Sections 12940-12948.

This Court's decision in *Hazelwood School District v. United States*, 433 U.S. 299 (1977), gives sufficiently clear guidance to demonstrate that the statistical imbalance was more than adequate to establish at least a *prima facie* case of discrimination on the part of the Transportation Agency; for "[w]here gross statistical disparities can be shown, they alone may in a proper case constitute *prima facie* proof of a pattern or practice of discrimination." *Id.* at 307-308. In *Teamsters v. United States*, 431 U.S. 324, n. 20 (1976), this Court stated:

> Statistics showing [gender] imbalance are appropriate in a case such as this one only because such imbalance is often a telltell sign of purposeful discrimination; absent explanation, it is ordinarily to be expected that nondiscriminatorily hiring practices will in time result in a work force more or less representative of the [gender] composition of a population in a community from which employees are hired." *Teamsters v. United States*, 431 U.S. 324, n. 20 (1976).

Having established at least a *prima facie* case of discrimination against Diane Joyce and women in general in the Transportation Agency, we turn to that circumstance which offers a further guarantee that such voluntary plans arise out of a substantial factual predicate generated by the employer's conduct. In *Weber*, this Court recognized that the job categories were "traditionally segregated." *Id.* at 209. We submit that the same circumstances exist with respect to skilled craft positions insofar as women have been denied hiring, training and promotion. It is sufficiently accepted for it to be a "proper subject for judicial notice." *Id.* at n. 1. Some of those same types of authorites are noted in the margin.[13] *Weber* established an important parameter

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[13] See, Brief of Lawyers Coordinating Committee Amicus Curiae, p. ——.

with respect of voluntary Affirmative Action Plans. They must relate to employment practices in job categories where there is a history and tradition of job discrimination. This is an important validation of affirmative action, which surely exists in this case.[14]

In summary, this record amply demonstrates why there is no reason to disturb the *Weber* teaching, which permits a voluntary Affirmative Action Plan "designed to eliminate conspicuous [gender] imbalance in traditionally segregated job categories," *Weber*, at 209.

Our inquiry is, of course, not completed, for the plan under attack must satisfy certain design features which further guarantee its remedial nature. We deal with those questions, particularly to the extent to which it trammels upon Paul Johnson's rights, *infra*. Before doing so, we canvass this Court's decisions since *Weber* to show that there has been no retreat from the proposition that there are two underlying themes which sustain affirmative action: (1) Assurance of sufficient factual predicate, and (2) Assurance that the rights of non-protected groups not be unnecessarily trammeled upon.

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[14] We are not asking that this Court overturn the trial court's finding that the Transportation Agency had not engaged in discrimination (Pet. 13a). The finding was of no moment since neither the Petitioner nor Respondent Transportation Agency asked the trial court to make either specific findings relating to Diane Joyce or general findings relating to the Agency's employment practices. Nor does the finding suggest that an unrebutted *prima facie* does not exist; only that no party asked that the trial court make an ultimate finding on that issue. Since it was not "litigated," it is a finding which is of little moment to challenge the Affirmative Action Plans.

III. SINCE WEBER, THIS COURT HAS MAINTAINED THE THEME THAT REMEDIAL RELIEF IS NOT PROHIBITED BY THE PRECEPTS ESTABLISHED BY TITLE VII EVEN IN THE ABSENCE OF A FINDING THAT THE EMPLOYER HAS DISCRIMINATED.

It is easier to justify affirmative action under the circumstances of this case than those arising in *Weber*. In *Weber*, Kaiser and the Steelworkers Union established a training program where "[s]election of craft trainees was made on the basis of seniority, with a proviso that at least 50% of the new trainees were to be black. . ." 443 U.S. at 199. Thus, white and black incumbent workers were entitled to assert their seniority rights for training for skilled craft positions. And this Court has repeatedly recognized that "[s]eniority systems and the entitlements conferred by credits earned thereunder are vast and increasingly important in the economic employment system of this Nation." *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 766 (1976). Second, the *Weber* training program established a strict numerical quota requiring that at least half of the admitees to the program were to be Black. Like this case, however, those who were foreclosed from the training program suffered no disability, but only their expectation of receiving craft training was possibly delayed, as Mr. Johnson's expectation of being promoted was possibly delayed.

The *Weber* plan was not built upon the foundation of any past finding of discrimination on the part of Kaiser or the Steelworkers Union, but only upon the unchallenged recognition that race had traditionally been a factor in excluding individuals from skilled crafts. *Weber*, 443 U.S. at n.1. That women have been historically excluded from skilled craft positions is also unassailable.[15]

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[15] In contrast, five out of 273 skilled craft workers at the plant involved were black, where none of the 238 skilled workers were women in the Transportation Agency prior to Diane Joyce's promotion.

Before commencing our analysis, we must divert our attention to two questions raised as to the applicability of *Weber* to public employers and to gender-conscious plans.[16] In *Weber*, this Court expressly declined to rule as to whether its principle is applicable to public employers. To be sure, in 1972 Congress amended the Civil Rights Act to bring within its sweep public employers and there is no suggestion in the statute or legislative history that Congress intended any different principles to apply under Title VII to public employers or private employers. And this Court has never applied a distinction between such employers when considering Title VII issues affecting public entities. *Connecticut v. Teal*, 457 U.S. 440 (1982); and *Bazemore v. Friday*, 478 U.S. ——, 92 L.Ed.2d 315 (1986). Nor do we understand Petitioner or any *amici* to argue that there are different statutory tests depending upon the nature of the employer involved.

Second, for purposes of the prohibited forms of discrimination contained in Section 2000-2(a), no distinctions are made between sex, race, or other specified categories. Nor do we understand Petitioner or any *amici* to suggest that there is any different statutory standard. This Court has treated the concepts as interchangeable. *Bazemore v. Friday, supra.* We, thus, approach the issues raised by *Weber* upon the accepted foundation that those principles applicable in race cases are equally applicable in gender cases under Title VII.

Before going forward, a brief comment "backward" is appropriate, for the Solicitor General invites this Court to resolve any ambiguities created by *Weber* by reviewing earlier decisions and, thus, limits *Weber*'s reach. (Br. 13). *Regents of the University of California v. Bakke, supra,* gives no comfort to this position. First, it is not a Title VII case concerning the purposes behind a statute enacted by Congress to deal with employment discrim-

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[16] The Solicitor General expresses the same view. (Br. n. 5).

ination. Second, the stated purpose of the University in adopting the special admissions program related to the interests of the medical school as well as general societal interests, contrary to this case where affirmative action plans related only to employment within the Transportation Agency. Third, the medical school had only been open for three years when the faculty adopted the special admissions program without any empirical basis related to the operation of the medical school. Finally, the special admissions program reserved positions to "disadvantaged" applicants. Here, no promotional position or hiring decision was reserved for women. We recognize, however, that *Bakke* contains this Court's first full-blown attempts to deal with "reverse discrimination." We think that this Court's later and more narrowly focused views in *Weber* and its employment discrimination progeny are more instructive.

The first such case is *Firefighters v. Stotts* 407 U.S. 561 (1984). The majority rejected the view that the trial court could modify a seniority system as part of the trial court's continuing supervision over a consent decree which did not modify that seniority system. We accept that view since nothing in this case reaches any similarly recognized interest or rights in which Paul Johnson had any legally cognizable claim. And, although Section 706(h) protects seniority systems, this Court has emphasized that the courts should not generally scrutinize decisions of public employers which relate to discipline or promotion and which are left to those generally appointed to make such decisions. Indeed, the Constitution "is not a guarantee against incorrect or ill-advised personnel decisions," *Bishop v. Wood*, 426 U.S. 341 (1976). Title VII reflects the congressional concern that management discretion with respect to hiring decisions not be disturbed. *Local No. 93, Firefighters v. City of Cleveland*, 478 U.S. ——, 92 L.Ed. 2d 405, 422 n. 10 (1986). The majority's opinion then points the way to the theme which we believe is

extracted from these cases of determining whether any right is implicated by the action of a governmental agency under an Affirmative Action Plan. Since there was no such right implicated in this case, *Stotts* requires us to move on to the three cases decided last term.

Wygant v. Jackson Board of Education, 476 U.S. ——, 90 L.Ed. 2d 260 (1986), focused once again upon layoffs in the face of a collective bargaining agreement, providing that such layoffs were to be governed by seniority. In rejecting the Affirmative Action Plan, Justice Powell emphasized for the Court the impact upon the "innocent" individuals:

> "In cases involving valid *hiring* goals, the burden to be borne by innocent individuals is diffused to a considerable extent among society generally. Though hiring goals may burden some innocent individuals, they simply do not impose the same kind of injury that layoffs impose. Denial of a future employment opportunity is not as intrusive as loss of an existing job." 90 L.Ed. 2d at 274.

We submit that Mr. Johnson's loss of this promotional opportunity posed an even less intrusive effect than if he had been denied hiring under a valid plan. One who is denied hiring may be left unemployed and without career opportunity in a major public employer. Paul Johnson remained employed with the opportunity to seek further promotions in Road Dispatcher positions or other positions. Measured against the "burden" or intrusiveness" standard, the Transportation Agency's actions are sufficiently narrowly tailored.

When discussing the second theme of the predicate for an affirmative action plan, the majority did not reach the issue, but pointed the way to a test which is entirely consistent with *Weber*. Specifically, Justice Powell wrote:

> "Evidentiary support for the conclusion that remedial action is warranted becomes crucial when the

> remedial program is challenged in court by nonminority employees. * * * In such a case, the trial court must make a factual determination that the employer had a strong basis in evidence for its conclusion that remedial action is necessary." 90 L.Ed. 2d at 271.

This is no different from the "conspicuous" or "manifest" statistical imbalance relied upon by this Court in *Weber* nor the "arguable violation" approach of Justice Blackmun in concurring in *Weber*.

These themes recur in *Local 28, Sheet Metal Workers International Association v. Equal Employment Opportunity Commission*, 478 U.S. ——, 92 L.Ed. 2d 344 (1986). In rejecting the constitutional challenge to the seniority relief, the majority noted that the lower court's orders will have only a marginal impact upon the interest of white workers. Justice Powell concurred, especially noting, "it does not appear that nonminorities will be burdened directly, if at all." Justices O'Connor and White rejected the lower court's order because they viewed it as ultimately requiring the replacement of current journeymen with apprentices on a racial basis. Needless to say, *Local 28* does not address the question of the predicate for such affirmative relief since there had been judicial findings of discrimination by Local 28. Whether the words "egregious," "contemptuous" or "pervasive" are accurate, their pejorative tone emphasizes that in voluntary affirmative action situations one will not expect the employer or the union to concede the discriminatory conduct. Indeed, such words are redundant since all discrimination is rejected by this Court in the strongest terms.

Finally, *Local No. 93, Firefighters v. City of Cleveland*, 478 U.S. ——, 92 L.Ed. 2d 405 (1986) involves the interpretation of Section 706(g), 42 U.S.C. Section 2000e-5 (g). In this case, this Court once again emphasized the importance of voluntary affirmative action and, therefore, found Section 706(g) inapplicable to a consent decree:

"It is equally clear that the voluntary action available to employers and unions seeking to eradicate [gender] discrimination may include [gender]-conscious relief that benefits individuals who were not actual victims of discrimination." 92 L.Ed. at 419.

We submit that *Stotts*, *Wygant*, *Local 28* and *Firefighters* have all validated the *Weber* concept, leaving "to another day the task of 'defin[ing] in detail the line of demarcation between permissible and impermissible affirmative action plans.'" *Firefighters*, *supra*, 92 L.Ed. 2d at 420, quoting from *Weber*. In the next section of this brief we shall confront the line of demarcation and demonstrate that the Affirmative Action Plans do not unnecessarily trammel upon Paul Johnson's interests.

IV. WEBER REQUIRES THAT AFFIRMATIVE ACTION PLANS BE TAILORED TO A NARROW REMEDIAL PURPOSE SO AS TO NOT UNNECESSARILY TRAMMEL UPON THE INTERESTS OF WORKERS WHO ARE NOT THE DIRECT BENEFICIARIES; THAT PURPOSE IS MET IN THIS CASE.

Once the predicate for the Affirmative Action Plan is established, *Weber* forces us to focus upon the narrowness of the remedy of the plan so as to protect the interests of those employees who are not the direct beneficiaries of the plan, although all employees are indirectly the beneficiaries of affirmative action efforts. Although *Weber* does not call for a balancing test between the extent of discrimination and the breadth of the remedy, that is necessarily implied in the process of fashioning any equitable relief. This Court recently reemphasized that the language of Title VII "plainly expresses Congress's intent to vest district courts with broad discretion to award 'appropriate' equitable relief to remedy unlawful discrimination." *Local 28*, 92 L.Ed. 2d at 369. Certainly a voluntarily adopted plan must take into account the extent of discrimination and the intrusiveness

upon the employees. In fashioning an Affirmative Action Plan, we cannot ignore the important role which the Union, Local 715, played in this process. The Union supported the Affirmative Action Plans and incorporated them into its Memorandum of Understanding which is enforceable under California law.[17] Under California law, public agencies have a duty to meet and confer with a recognized employee organization which is the analog of bargaining in good faith under the National Labor Relations Act. California Government Code § 3505 and 29 U.S.C. § 158(a)(5). Hence, Local 715 is in the position of having agreed to the "County Affirmative Action goals and timetables as adopted by the Board of Supervisors." (J.A. 146). And more by its vigorous participation in this case in the court below and this Court, it is an advocate on behalf of its membership for such goals. And the advocacy extends to the 238 men who were in the Transportation Department in the skilled craft classification who were part of the bargaining unit represented by the Union. Thus, as far as the record shows, it is only Paul Johnson out of the entire membership who has objected to the Affirmative Action Plan.

In the context of collective bargaining, this Court has acknowledged that:

> "Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. The mere existence of such differences does not make it invalid. The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion." *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953).

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[17] *Glendale City Employees' Association v. City of Glendale*, 15 Cal. 3d 328 (1975).

Even in allocating seniority which will lead inevitably to layoffs, unions may adjust seniority as long as the union's conduct does not violate its duty of fair representation. *Humphrey v. Moore*, 375 U.S. 335 (1964). See also, *Vaca v. Sipes*, 386 U.S. 171 (1967).

Of course, if the decision by the Union is based on racial or sex discrimination it is a violation of the union's duty of fair representation. *Brotherhood of Railroad Trainmen v. Howard*, 343 U.S. 768 (1952). And, this Court has recognized that "[t]he elimination of discrimination and its vestiges is an appropriate subject of bargaining, and an employer may have no objection to incorporating into a collective bargaining agreement the substance of his obligation not to discriminate . . ." *Emporium Capwell Co. v. Western Addition Community Organization*, 420 U.S. 50, 69 (1975). We think it is a forceful component of validating any affirmative action plan that the Union which represents the employees supports such goals and timetables, for effectively such bargaining is a legitimate [18] means of accommodating the competing interests of all employees:

> "The Court has also held that a collective bargaining agreement may . . . enhanc[e] the seniority status of certain employees for purposes of furthering public policy interests beyond what is required by statute, even though this will to some extent be detrimental to the expectations acquired by other employees under the previous seniority agreement [citation]. And the ability of the union and the employer voluntarily modify the seniority system to the end of ameliorating the effects of past racial discrimination, a national policy objective of the 'highest priority' is cer-

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[18] We do not suggest that this proposition can be accepted where the Union itself is shown to be discriminatorily administered, nor are all individual rights of Title VII subsumed by the bargaining agents agreement with an employer.

tainly no less than in other areas of public policy interests." *Franks v. Bowman Transportation Co., supra*, 424 U.S. at 778-79. (union agreed with retroactive seniority).

It should not be forgotten that *Weber* arises in the context of an affirmative action plan worked out through collective bargaining between the union and the employer. The parties there were able to develop a satisfactory plan which did not unnecessarily trammel the interests of nonminority workers. We think because evaluation of the County's plans will demonstrate such a minimal impact, the same is true precisely because the union involved, Local 715 agreed to the plan and thus effectively protected the interests of nonminority workers. We now turn more specifically to the three factors discussed in *Weber* in validating any plan, 443 U.S. at 192.

In viewing this issue we must repeat that Johnson had no right nor legally cognizable interest in the promotion. Under California law, he may not challenge the appointing authority's decision as to whom to select among those who are qualified; he may only mount a legal challenge if he is ruled "unqualified" because of a faulty testing procedure.[19]

First, the plan cannot require the discharge of current workers and their replacement with the beneficiaries of the plan. Of course, nothing approaching that happened here. On the other hand, the force of this Court's statement is muted by those cases which grant retroactive

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[19] *Almassy v. Los Angeles County Civil Service Commission*, 34 Cal.2d 387 (1949) and *Wilson v. Ostly*, 173 Cal. App. 2d 78 (1959). New York law, for example, is the same. *Kirkland v. New York State Department of Correctional Services, supra*, 711 F.2d *at* 1134. No due process rights are triggered under either the State or Federal constitution where promotions are denied. *Fuchs v. Los Angeles County Civil Service Commission*, 34 Cal. App. 3d 709 (1973); and *Schultz v. Regents of the University of California*, 160 Cal. App. 3d 768 (1984).

seniority to actual victims of discrimination. *Teamsters*, and *Franks v. Bowman Transportation Co.*, *supra*, 424 U.S. at 779. Although limiting such relief only to actual victims, necessarily the reinstatement and retroactive seniority compels certain junior employees to be laid off when the actual victims are instated to their positions.

Second, the plan cannot constitute an absolute bar to the non-beneficiaries of the plan. In *Weber*, half of the training positions were open to whites based on seniority. Over time, not all whites would necessarily be able to assert their seniority to participate. Here, no bar to any advancement was made. Johnson remained eligible for any further advancement to higher levels of Road Maintenance Worker [20] or Road Dispatcher.

Petitioner did not offer any evidence to prove that there would not be further promotional opportunities available to him, although we know that there were only a few Road Dispatcher positions, making it unlikely in the near future that another promotion to that position would arise quickly. The 1982 plan contemplated 55 openings in skilled craft positions, although we do not know how many would be promotional. The 1981 figure shows four promotional positions open in skilled craft positions. (J.A. 144). Johnson has not met his burden of showing that he was foreclosed for any substantial amount of time from procuring a promotion in the Transportation Agency.

Third, in assuring that the plan "is not intended to maintain [gender] balance, but to eliminate a manifest [gender] imbalance . . . ," (*Id.* at 208), the Court noted but did not require that a plan be temporary. In the

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[20] When Johnson took the demotion because his salary was cut when the Transportation Agency was reorganized in 1977, he hoped that it would open additional promotional opportunities to him. He must have had in mind promotion to Road Maintenance Worker III and IV, not Road Disptacher since he was already qualified for any Road Dispatcher position. See p. 4, *supra*.

Weber case, the quota was to expire when the relevant percentages were met. Thus, this Court did not say that affirmative action may not end, only that it could not have the improper purpose of maintaining a race or gender balance. Here, we need not even reach the question of when the plan would have the effect of maintaining rather than attaining because the promotion of Diane Joyce to a skilled craft position, "increasing" the percentage of women incumbents from zero percent to less than one half of one percent, can hardly have the effect of maintaining anything other than the gender imbalance. That is, from the point of view of remedy, it was such a "small dent", (T. 64) to use Mr. Graebner's words, that it probably did as much to preserve the imbalance as remedy it.

As we have noted above, the promotional opportunity came just after the plans were adopted but before short term goals were established. Nothing in the plans suggest that they would continue in any classification or category once goals were met. And the Solicitor has expressly noted that in certain categories partity was met without any suggestion that affirmative action by way of choosing beneficiaries of the plan would continue as to those classifications (Br. 27, n. 19). Nothing in any prior opinion of this Court suggests that a public agency may not continue the recruitment, monitoring and other aspects of Affirmative Action Plans on a permanent basis. Ironically, if the County only targeted 3 skilled craft positions to be filled by women out of 55 available skilled craft positions one could argue that once that percentage was reached (six percent of 238), then any further application of goals would be "maintenance." [21] This would

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[21] This invites this Court to avoid the question of when the apparent permanence of a plan might violate the remedial requirement of *Weber*. Here, there is no evidence that the disputed plans have been applied to anyone other than Diane Joyce. From the discussion above it is clear that the time when gender balance may be achieved is many years ahead, and at that point the preferential

not occur until at least five years of operation of the short term goal.

The court below fairly read the plan as not operating for the purpose of maintaining a gender balance. Although Petitioner presses the argument that the court's reading of the plan violates the clearly erroneous rule, that argument is flawed since all that the court below did was read the document, which review does not implicate the clearly erroneous rule.[22] But, this Court's opinion in *Weber* teaches that we do not focus upon whether there is an ending date, but the ultimate purpose of the plan. And the trial court's mechanical application of the "ending date" concept to invalidate the plan because it was an evolving document without a specific end date is not tuned to the purpose of noting (but not holding) that the valid *Weber* plan was temporary.[23]

Where the Transportation Agency has taken such a small step forward, it is unfair to criticize it for not being able to predict when some reasonable level of women in the work force would be achieved. The argument of the Solicitor General that "the apparent permanence", Br. at 27, renders the plan lacking in the ap-

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promotion of a woman might cross the line between remedial of an imbalance to maintenance of a balance.

[22] 5A, *Moore's Federal Practice* 2d. ed., para. 52.04.

[23] In the context of collective bargaining in the private sector, collective bargaining agreements are always temporary for many reasons. Here, we are dealing with a County-wide plan adopted though a legislative process as well as agency and departmental plans. Under this process, the Agency or County could modify or change the plan at will, something which cannot be done under a negotiated plan for a specific period of time. This argument holds true even though the Affirmative Action Plan was incorporated into the Memorandum of Understanding with Local 715. Nothing in the record suggests that the plan was coterminous with the ending dates of the Memorandum, although the Union's ability to enforce the plan as part of the Memorandum would expire during any hiatus between an old and new plan.

propriate remedial interest, improperly faults a public employer who adopts the most minimal of goals (six percent goal), and who is, thereby, unable to state when the statistical imbalance will be remedied. Indeed, the fallacy of the argument comes from the Solicitor General's brief when he notes that "a 50% female quota would not enable Respondent to meet its goal for fifteen years." Br. at 28, n. 19. In choosing, between excessive goals with a statistically predictable date for achievement of some gender balance; and, on the other hand, minimal and innocuous goals without a predictable date for eliminating imbalance, we think it is less intrusive and more remedial to opt for the more conservative course.

In summary, the isolated promotion of Diane Joyce under the circumstances falls well on the permissible side of affirmative action.

CONCLUSION

For the reasons suggested above, the judgment of the court below should be affirmed.

Respectfully submitted,

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